

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

TIKTOK INC., et al.,

Plaintiffs,

v.

DONALD J. TRUMP, President of the United
States, et. al.,

Defendants.

Civil Action No. 1:20-cv-02658 (CJN)

MEMORANDUM OPINION

On September 24, 2020, the Secretary of Commerce published a list of five types of prohibited business transactions involving Plaintiffs. If implemented, those prohibitions would effectively ban the operation of Plaintiff TikTok in the United States. On September 27, the Court granted Plaintiffs’ motion for a preliminary injunction with respect to the prohibitions that would have taken effect that day, but deferred judgment as to the others. *See* ECF Nos. 29–30. For the reasons discussed below, the Court now grants Plaintiffs’ motion as to all the prohibitions.

I. BACKGROUND

A. International Emergency Economic Powers Act

The United States has long used economic sanctions to prohibit transactions that threaten national security. In 1977, Congress enacted IEEPA, which grants the President peacetime authority “to deal with any unusual and extraordinary” foreign “threat” to U.S. “national security” so long as “the President declares a national emergency with respect to such threat.” 50 U.S.C. § 1701(a). Once the President has declared such an emergency, IEEPA empowers the President to:

[R]egulate, direct and compel, nullify, void, prevent or prohibit, any . . . transfer . . . of, or dealing in, . . . or transactions involving, any property in which any foreign country or a national thereof has any interest . . . with respect to any property, subject to the jurisdiction of the United States[.]

Id. § 1702(a)(1)(B). The President may also “empower the head of any” executive agency to take those actions on his behalf. 3 U.S.C. §§ 301–02.

Although broad, the President’s IEEPA authority is subject to certain limitations. *See* 50 U.S.C. § 1702(b). As relevant here, the statute expressly provides that “[t]he authority granted to the President . . . does *not* include the authority to regulate or prohibit, *directly or indirectly*”:

any . . . personal communication, which does not involve a transfer of anything of value;

[or]

the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, . . . artworks, and news wire feeds.

Id. § 1702(b)(1), (3) (emphasis added).

Since its enactment, IEEPA has included a limitation relating to personal communications. Pub. L. No. 95-223, § 203(b)(1), 91 Stat. 1627 (1977). In 1988, Congress added the limitation relating to the importation and exportation of informational materials “as a reaction to several seizures by the United States of shipments of magazines and books from embargoed countries and to the Treasury Department’s restrictions on the permissible forms of payment for informational materials purchased from Cuba.” *Kalantari v. NITV, Inc.*, 352 F.3d 1202, 1205 (9th Cir. 2003). In 1994, Congress expanded the “nonexclusive list of informational materials to include new media, such as compact discs and CD ROMs” and added the phrase “regardless of format or medium of transmission.” *Id.*

B. Executive Orders Regarding Foreign-Controlled Technology Companies and TikTok

On May 15, 2019, the President invoked his authority under IEEPA (among other powers) and declared a national emergency regarding the “extraordinary threat” that foreign-controlled technology companies pose to U.S. national security. Exec. Order No. 13873, *Securing the Information and Communications Technology and Services Supply Chain*, 84 Fed. Reg. 22689 (May 15, 2019) (“ICTS Order”). The President therefore determined to prohibit certain transactions with foreign countries or foreign nationals that pose national security risks to the United States. *Id.* On May 13, 2020, the President renewed that declaration, stressing the unique threat posed by China-based technology firms with close ties to the government of the People’s Republic of China (“PRC”). *Continuation of the National Emergency With Respect to Securing the Information and Communications Technology and Services Supply Chain*, 85 Fed. Reg. 29321 (May 13, 2020).

On August 6, 2020, the President identified TikTok—a short-loop video sharing app presently used by over 100 million Americans, Compl., ECF No. 1, ¶ 1—as a technology firm that poses a risk to national security. *See* Exec. Order No. 13942, *Addressing the Threat Posed by TikTok, and Taking Additional Steps To Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain*, 85 Fed. Reg. 48637 (Aug. 6, 2020) (“TikTok Order”). The President determined that TikTok “automatically captures vast swaths of information from its users, including internet and other network activity information such as location data and browsing and search histories.” *Id.* The President concluded that because TikTok is owned by the China-based company ByteDance, the Chinese Communist Party (“CCP”) might be able to “access . . . Americans’ personal and proprietary information—potentially

allowing China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage.” *Id.*

The President also found that TikTok could be used to transmit CCP-approved propaganda. The CCP could, he determined, use TikTok to “censor[] content that the [CCP] deems politically sensitive,” *id.*, and share “disinformation campaigns that benefit the [CCP], such as when TikTok videos spread debunked conspiracy theories about the origins of the 2019 Novel Coronavirus.” *Id.*

The President took two actions to mitigate those risks. First, he directed the Secretary of Commerce to identify a list of prohibited transactions with “ByteDance . . . or its subsidiaries,” including TikTok. *Id.* at 48638. Second, he ordered ByteDance to divest itself of TikTok’s U.S. operations, including any interest it might have in U.S. user data. *See Regarding the Acquisition of Musical.ly by ByteDance Ltd.*, 85 Fed. Reg. 51297 (Aug. 14, 2020) (“Divestment Order”). The Divestment Order directed the interagency Committee on Foreign Investment in the United States (“CFIUS”) to ensure the sale by ByteDance of “any tangible or intangible assets . . . used to enable or support” its “operation of the TikTok application in the United States” by November 12, 2020, unless CFIUS extended that deadline “for a period not to exceed 30 days.” *Id.*

C. The Secretary’s TikTok Prohibitions

Acting pursuant to the TikTok Order, on September 18, 2020, the Secretary of Commerce published a list of five sets of prohibited transactions. After revising one implementation date, the Secretary finalized the following set of unlawful transactions:

1. Any provision of services, occurring on or after 11:59 p.m. eastern standard time on September 27, 2020, to distribute or maintain the TikTok mobile application, constituent code, or application updates through an online mobile application store[;]
2. Any provision of internet hosting services, occurring on or after 11:59 p.m. eastern standard time on November 12, 2020, enabling the functioning or optimization of the TikTok mobile application[;]

3. Any provision of content delivery network services, occurring on or after 11:59 p.m. eastern standard time on November 12, 2020, enabling the functioning or optimization of the TikTok mobile application[;]

4. Any provision of directly contracted or arranged internet transit or peering services, occurring on or after 11:59 p.m. eastern standard time on November 12, 2020, enabling the functioning or optimization of the TikTok mobile application[; and]

5. Any utilization, occurring on or after 11:59 p.m. eastern standard time on November 12, 2020, of the TikTok mobile application's constituent code, functions, or services in the functioning of software or services developed and/or accessible within the land and maritime borders of the United States and its territories[.]

U.S. Dep't of Commerce, *Identification of Prohibited Transactions to Implement Executive Order 13942 and Address the Threat Posed by TikTok and the National Emergency with Respect to the Information and Communications Technology and Services Supply Chain*, 85 Fed. Reg. 60061, 60062 (Sept. 24, 2020) ("Commerce Identification").¹

Before issuing those prohibited transactions, the Secretary reviewed and relied on an internal Memorandum assessing the threats posed by ByteDance and TikTok. U.S. Dep't of Commerce, Mem. for the Sec'y, *Proposed Prohibited Transactions Related to TikTok Pursuant to Executive Order 13942* (Sept. 17, 2020), ECF No. 48-2, AR 27–50 ("Commerce Memorandum"); *see also* Defs.' Mem. Opp'n Pls.' P.I. Mot., ECF No. 22, 2 ("Defs.' Opp'n"). Like the President's TikTok Order, the Commerce Memorandum focuses on two threats: exporting data and importing propaganda. *See* Commerce Memorandum, ECF No. 48-2, AR 30–35 (data), AR 35–38 (propaganda).

¹ The Commerce Identification states that the prohibitions "only apply to the parties to business-to-business transactions." Commerce Identification, 85 Fed. Reg. at 60062.. It also notes that the prohibitions "do not apply to . . . [t]he exchange . . . of personal or business information" shared among TikTok users on the app, *id.*, and that none of the prohibitions bars transactions related to restructuring TikTok in accordance with the President's Divestment Order. *Id.*

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